

CATALAN SOCIAL SCIENCES REVIEW, 6: 25-52 (2016)  
[Secció de Filosofia i Ciències Socials](#), IEC, Barcelona  
ISSN: 2014-6035  
DOI: 10.2436/20.3000.02.30  
<http://revistes.iec.cat/index/CSSr>

## The impact of the crisis on social rights

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### Original source:

***Revista Catalana de Dret Públic*, 46: 47-72 (2013)**

(<http://revistes.eapc.gencat.cat/index.php/rcdp>)

Translated from Catalan by Mary Black

### Abstract

*This article analyses, without any attempt to be exhaustive, the legal impact that different measures taken to deal with the economic and financial crisis through legislation meant for urgent circumstances has had on some social rights. In this sense, we specifically focus on the effect of such measures in relation to labour rights, the right to housing and some social benefits.*

**Key words:** social rights, economic and financial crisis, labour rights, right to housing, social benefits.

### 1. Introduction

The world economic and financial crisis, which has affected Europe particularly intensely in the states within the Eurozone, has unleashed an entire series of institutional reactions to deal with it. These reactions have been constitutionally and legally significant and have had major effects on the regulation of rights in the social, cultural and economic spheres. The constitutional reforms carried out in Germany, Spain and Italy to include the principle of the stability of public finances into the supreme law of the land, known as the *golden rule* on budgetary matters, reveal the scope of the crisis' impact on the foundations of the rule of law, especially the division of powers. It also questions the juridical impact that the legal measures taken to outline and execute this rule may have on the guarantee of the rights that are the most deeply rooted on the underpinnings of the social state.

The purpose of this study is to analyse, without any attempt to be exhaustive, this legal impact on some of the social rights that are part of what is called the welfare state. With this purpose in mind, in addition to offering a summary and descriptive outline of the causes that may explain the serious crisis underway, in the first section we shall analyse the consequences of the repeated use of the legal institution of the decree-law on power relations. We shall then examine the effects that the labour reform has had on the particularly

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significant social rights such as labour rights (art. 35.1 of the Spanish Constitution [SC]; art. 25 Statute of Autonomy of Catalonia [SAC]) and collective bargaining (art. 37.1 SC). We will continue with an analysis of the measures that lawmakers have taken in some autonomous communities (ACs), such as in the 2007 case involving Catalonia at the start of the crisis, and more recently Andalusia, to guarantee the right to decent housing (art. 47 SC; 26 and 47 SAC, art. 56.1 Statute of Autonomy of Andalusia [SAA]). Finally, we shall mention the recent Constitutional Court Ruling (CCR) 61/2013 dated 14 March 2013 on calculating the vesting periods in part-time work contracts, in which the Court declared the system used to calculate vesting periods in part-time contracts when requesting a contributory pension unconstitutional and null and void.

## **2. The background of the crisis and the legal responses: The reform of article 135 SC**

A) The economic and financial crisis that emerged in the middle of the past decade originated in the failure of the real estate sector in the United States in 2007 (Ruiz-Huerta, 2012: 147 and forward). According to the senior European Union politicians, the public debt crisis was the cause of the financial crisis, and in particular the crisis in credit entities in the EU. However, this is a story that contrasts considerably with what is claimed by economists who are more critical of the causes behind the crisis. They claim that the explanation is precisely the opposite: the international financial situation is what caused the public debt crisis, not vice-versa. Additionally, we should add the grave situation of public finances compared to public spending and the revenues of the public administrations in the states within the Eurozone, which had promoted a policy of low fiscal pressure. In the specific case of the Spanish economy, we must also bear in mind the structural problems that have aggravated the situation, namely structural unemployment, low productivity, excessive dependence on a given economic sector or sub-sector, difficulty creating companies and a high level of decentralisation of revenues and spending, which were not accompanied state-wide by suitable coordination mechanisms among the different levels of public administration involved (Ruiz Almendral, 2009: 113).

The general explanation of the crisis has been crafted in the following terms: during the expansive economic cycle, governments drew up budgets with limited public deficits, although public debt was quite high. In contrast, the private sector, particularly in Spain, spurred by the real estate bubble, reacted by tending to take on much higher debt than it could handle. The banks were not very scrupulous when lending capital to whomever asked for it, capital that they did not have either but instead had to largely find abroad. That is, Spanish banks and savings and loans were also in debt. Therefore, the indirect or remote creditor of Spanish citizens has often been and still is European financial entities in the Eurozone (especially Germany and France). The reports predicting the burst of the real estate bubble led to a considerable deterioration in public finances, inasmuch as external private debt affected the economic system of the state via fiscal crisis and growth in sovereign public debt. The risk premium – defined as the difference between what it costs to request credit in a ten-year loan with respect to the German bond – has become an unavoidable benchmark in capturing the health of the economic systems.

This crisis implacably affected the stability of public finances, and the first major response was to incorporate the principle of stability into the supreme law of the land, even though this rule, called the *golden rule*, was already established in European law. The first was Germany in 2009, which after a long period of reflection took the decision to reform its 1949 constitution. It was followed by Spain (2011), which did so almost summarily, and later Italy followed suit (2012). Other states have included it via lower-ranking regulations (France). And it was particularly after the implementation of the principle of stability of public finances that an entire series of laws were enacted that have influenced and affected the purpose and scope of certain rights within the social and economic order.

B) The preamble to the reform of article 135 SC dated 27 September 2011 explicitly includes a European referent, namely the 2011 reform of the EU's 2007 Stability and Growth Plan (SGP), and it justifies the constitutional revision by "the current economic and financial situation, which is marked by a profound, lasting crisis", stating that the reform's goal is "[...] strengthening trust in the stability of the Spanish economy in the middle and long term", as well as "[...]reinforcing Spain's commitment to the European Union while guaranteeing the economic and social stability of our country".

The reform of article 135 introduced an important, decisive change in the formal and material aspects of the regulation of public finances. The constitutional revision was carried out quite quickly without a prior reflection period using an emergency parliamentary procedure in a single reading, via agreement between the government of President Rodríguez Zapatero (Socialist Workers' Party of Spain, or PSOE in its Spanish abbreviation) and the People's Party (PP), which was the opposition at that time.

Its essential content consisted of the establishment of:

- *The principle of budgetary stability*, in which all the public administrations (state, autonomous communities and local entities) have to match their actions to the principle of budgetary stability.
- *European law as the parameter of constitutionality*: The state and the autonomous communities cannot run a structural deficit than exceeds the margins established by the European Union. In this sense, from now on the provisions contained in the Treaty Establishing the European Stability Mechanism issued in Brussels on 2 February 2012 and the Treaty on Stability, Coordination and Governance of the European Economic and Monetary Union signed in Brussels on 2 March 2012 must be borne in mind. The limits to the structural deficit shall be applicable after 2020 (single additional provision).
- *Parliamentary delegation to set the deficit limits*. An organic law will set the maximum structural deficit allowed by the state and the autonomous communities in relation to the gross national product. The local entities must show balanced budgets. This law had to be approved by 30 June 2012 (single additional provision, paragraph 1). According to this constitutional mandate, the law was approved before the deadline: specifically, Organic Law 2/2012 dated 27 April 2012 on budgetary stability and financial sustainability, approved

under the mandate of the government of President Rajoy (PP), which was formed after the legislative elections held on 20 November 2011.

- *Legal reservation for the issuance of conditional public debt.* The state and the autonomous communities must be authorised by law to issue public debt or take on credit. The conditions are the following:
  - Credits to pay the interest and capital of public debt of the administration shall always be understood as included as expenditures from their budgets, and paying them shall be an absolute priority.
  - Credits may not be subjected to amendment or modification as long as they match the conditions on the issuance law.
  - The public debt of all the public administrations may not exceed the reference value established in the Treaty on the Functioning of the European Union.
- *The exception to the limits on deficit and debt.* These limits may only be exceeded under the following circumstances: natural catastrophes, economic recession or extraordinary emergency situations which are beyond the control of the state and considerably harm the financial situation or economic or social sustainability of the state. These circumstances must be agreed upon by the absolute majority of the Congress of Deputies.
- *The content of the organic law.* The law must regulate:
  - The distribution of the limits to the deficit and debt among the different public administrations, the exceptional circumstances in which the deficit may be exceeded, and the manner and timeframe for correcting any deviations which might arise.
  - The methodology and calculation of the structural deficit.
  - Each administration's responsibility in the event that the budgetary stability objectives are not met.
- *The principle of budgetary stability obligates the autonomous communities.* The infra-state political entities, in line with their statutes of autonomy, must adapt their own provisions to those contained in article 135 SC. Thus, for example, Catalonia (Law 6/2012 dated 17 May 2012), Galicia (Law 6/2012, dated 17 May 2012) and Aragón (Law 5/2012, dated 7 June 2012) now have their own laws on budgetary stability.

The reform of article 135 SC necessitates a commentary which must cover three aspects of special interest: a) the background and theoretical underpinning of the constitutionalisation of the rules on balancing the public finances; b) the position of European law in relation to establishing the principle of budget stability in the Constitution; and c) the procedure of revising the Constitution and the content of article 135 SC.<sup>1</sup>

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<sup>1</sup> Regarding the reform of article 135 SC, see the *Revista Española de Derecho Constitucional* no. 93, September-December 2011, which gathered the opinions of a group of constitutionalists

a') *Precedents in comparative law on the incorporation of the limit on public deficit into constitutions* are hard to find, because it is certainly not common for a constitutional text to contain rules of this nature. The most significant similar case is the reference to the public debt contained in the 14th Amendment, section 4, of the Constitution of the United States (dated 9 July 1868): "The validity of public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned [...]." It is also common to invoke the case of article 14 of the French Constitution from the Second Republic in 1848, which considers all kinds of obligations contracted by the state from creditors as inviolable, or even the law dated 10 August 1926, approved during the Third French Republic, which amended its constitutional laws by stating that "the amortisation of the public debt is constitutional in nature".

In any event, the incorporation of balanced budgets into the Constitution seems like a very rigid choice. There is clearly no doubt that sound stewardship of public accounts should lead to a reasonable balance between income and expenditures during the budgetary period. And in this sense, the stability of the public finances should be a goal of the state's economic policies, in line with its own economic capacity. However, budgetary instability does not exclude the possibility of running a deficit, whereas the notion of budgetary balance seems to shut down the state's ability to become indebted, which would be contradictory to the objectives of the social and democratic rule of law.

From a legal standpoint, the constitutional reform in Spain, which incorporated the principle of budgetary stability, does not seem absolutely necessary. The external reasons from the European Union are a different matter, which may explain a constitutional reform pushed through urgently during the summer of 2011. Indeed, it was unnecessary because the provisions on budgetary stability were already contained in European primary law (art. 126 of the Treaty on the Functioning of the European Union), and furthermore, the primacy of European law over national law meant that the state was already bound to the objective of compulsory budgetary stability for all public administrations. In accordance with its exclusive competence ex art. 149.1.13<sup>a</sup> SC to set "[the] bases and coordination of general planning of the economic activity", the state has the regulatory capacity to approve specific laws on budgetary stability for the general state administration, the autonomous communities (ACs) and the local entities. In this sense, since 2001 it had been legislating in this vein through Organic Law 18/2001 dated 12 December 2001, on General Budgetary Stability (Aznar government, PP), which was modified by Legislative Degree 2/2007 dated 28 December 2007 (Rodríguez Zapatero government, PSOE).

In turn, through repeated jurisprudence (among others, CCR 134/2011 dated 20 July 2011) the Constitutional Court has interpreted that in accordance with articles 149.1.13<sup>a</sup> and 14a SC, the state has the competence to take compulsory measures that limit the budgetary capacity of the ACs and local corporations. Therefore, the state already had the legal capacity needed to

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(pp. 159-210). See, too, the issue of the journal *Claves de Razón Práctica*, no. 216, October 2011, with the contributions of Professors Blanco Valdés and Tajadura Tejada; Bassols Coma (2012); Ruiz Almendral (2009); Embid Irujo (2012); Medina Guerrero (2012).

intervene in the economic and financial system without the need for the reform of art. 135 SC.

On the other hand, this constitutional reform starts with a political and financial approach that reflects a given economic and financial option, although it does not necessarily have to be the only possible one. For this reason, it introduces a factor of rigidity in the matter, such as the budgetary authority of the Parliament, which by its very political nature requires a much more flexible legal instrument than the Constitution to deal with the fluctuations in the economic and financial situation at any given time.

b') *The position of European law in determining the principle of budgetary stability in the Constitution.* The reform of art. 135 of the SC was framed as a way to incorporate EU law into the Constitution (Rubio Llorente, 2011: 4 and following), that is, as an opportunity to formalise the presence of the European legal order in Spanish law. However, as mentioned above, the legal authority to establish limits to the deficit and public debt was already provided by EU law; furthermore, the primacy of European law rendered the constitutional reform unnecessary (Ferrerres Comella, 2012: 101-102).

Despite this, we should point out the newness of the double reference made in EU law in sections two (public deficit) and three (public debt), which now turn European law into a parameter of constitutionality which constitutional judges must unquestionably bear in mind. This circumstance opens up a new scenario in constitutional jurisprudence, since until now the Constitutional Court has always declared that it is not the judge of EU law (CCR 28/1991, Legal Underpinning [LU] 4 and 64/1991, LU 4). Inasmuch as the constitutional reform itself is what made EU law an integral part of the parameter of constitutionality, the Constitutional Court must somehow incorporate it into its judgement of constitutionality.

c') *The constitutional review procedure and the content of art. 135 SC.*<sup>2</sup>

a") The first observation which must be made on the reform procedure is the speed with which it was undertaken during August 2011, after the in extremis agreement between the two main political parties statewide, the PSOE and the PP, without the cooperation of the minority parties (IU-ICV, UPD, ERC, BNG) or the peripheral nationalist parties (PNB and CiU). This circumstance contrasts with the widespread consensus generated by the approval of the 1978 Constitution, and is a poor precedent for Spain's political life. The constitutional reform was undertaken under the urgent procedure with a single reading. Therefore, it is a reform hastily made, essentially in one month, which appeared in the Official National Gazette (abbreviated BOE in Spanish) dated 27 September of that same year, and it affected an issue of particular importance, namely the inclusion of the golden rule in budgetary matters, without prior political and juridical debate. There was no debate in Parliament, nor discussion among the social and economic stakeholders. Nor was there a prior juridical debate because of the unexpected swiftness of the political decision. This

<sup>2</sup> The considerations made in this section originate in the lecture (*Rapport sur l'Espagne*) I delivered at the 28<sup>th</sup> Table Ronde Internationale on *Le juge constitutionnel et l'équilibre des finances publiques*, organised by the Institut Louis Favoreu et le Group d'Études et de Recherches sur la Justice Constitutionnelle and held in the University of Aix-en-Provence on 14 and 15 September 2012.

circumstance also contrasts with the two years that Germany required in the reform of its *Grundgesetz* in 2009.

There were attempts to justify the summary constitutional review in the preamble of the reform. After mentioning the EU Stability and Growth Pact, which sought to prevent the appearance of an excessive budget deficit in the euro zone, it argued that: “[...] the current economic and financial situation, marked by a profound, prolonged crisis, has only reinforced the timeliness of carrying out the reference principle in our Constitution, with the purpose of strengthening trust in the stability of the Spanish economy in the middle and long term”. Likewise, it adds that the purpose of the reform is “[...] to reinforce Spain’s commitment to the European Union while also guaranteeing the economic and social sustainability of our country”. The political authors of the reform probably had solid reasons for carrying it out in such a summary fashion, and surely their goal with this decision was to provide a quick response to the request issued to all the member states of the Eurogroup in the wake of the communication issued by the Chancellor of the Federal Republic of Germany and the President of the French Republic, and likely the European Central Bank as well.

b”) The parliamentary procedure used to approve this reform was the special urgent procedure with a single reading (Bassols Coma, 2012: 23-29). According to art. 150.1 of the Regulation of the Congress of Deputies (RCD), “When the nature of the project or proposed law being considered advises it, or when the simplicity of its formulation allows it, the Plenary Session of the Legislature, at the proposal of the Committee, heard by the Conference of Presidents, may agree to directly process it in a single reading”. If the agreement is adopted, the debate is held in the same way, as a holistic debate (art. 150.2 RCD), meaning that the parliamentary deliberation is carried out on the text as a whole, not article by article. And “if the result of the vote is favourable, the text shall be considered approved and shall be forwarded to the Senate [...]”. The single reading procedure in the Senate is similar (art. 129 Regulation of the Senate [RS]).

Therefore, it is clear that the nature of the reform of the Constitution in terms of the importance and relevancy of the content of art. 135 SC advises against carrying out the debate and approval of the project presented by the government in such a summary procedure as single reading. After all, the parliamentary debate was, in fact, reduced to its minimum expression, while the purpose of the reform is nothing short of the incorporation of the golden rule in budgetary matters into the Constitution regarding both the deficit and the public debt. Likewise, this reform directly affects the content of the social rights that may be affected by the reduction in public spending, and therefore the goals of the social and democratic state of law. Therefore, there may be powerful reasons why the nature of the project did not allow for the application of the urgent procedure in single reading. Nor did the content of the project, which is anything but simple. In this sense, the second constitutional reform from 2011 has little to do with the first one effected in 1992 when Spain joined the Maastricht Treaty, which consisted of the addition of the word “passive” in article 13.2 SC related to foreigners’ right to vote.

There is no doubt that the choice of this procedure, which avoided debate on a constitutional reform of the political and legal scope of article 135 SC, did

not leave the minority parliamentary groups indifferent. And this was the case of the parliamentary group made up of the deputies from the ERC and the ICV, who filed an appeal against different Congress of Deputies resolutions for failure to admit the complaints cited against the choice of the urgent procedure in single reading to approve the reform. Since this as an act of legislative power, the appeal went directly before the Constitutional Court. The fundamental law invoked by the deputies was the right to political participation, and specifically political representatives' right to *ius in officium* (art. 23.2 SC). The Constitutional Court majority issued an interlocutory rejecting the appeal. The main argument supporting their decision, in relation to the option to use the procedure of single reading, stated that "[...] the norms applicable (art. 150 RCD and similar) do not establish matters not subjected to that procedure [...]", the reason why the legal order did not prevent the use of this procedure. Regarding the request for urgent decision on the reform, the Court further underscored that "[...] it cannot be asserted that there were no underlying reasons for the request, from the time when the term of the legislature had been publicly announced by recourse to the calling of early elections [...]" (Interlocutory dated 13 January 2012). Two of the magistrates who disagreed with the resolution stated that they believed that an issue of this importance should have been resolved with a ruling, while a third expressed his disagreement in the sense that the court should have analysed whether the vote of the Congress of the Deputies which determined the adoption of the procedure of single reading had obeyed the regulatory mandate of art. 150 RCD.

c") The analysis of the content of the reform of art. 135 SC (Medina Guerrero, 2012: 131-164; Embid Irujo, 2012: 65-90) allows us to state that it is a highly detailed precept. Despite this, the most important aspects refer first to the incorporation of European law as a generic parameter of constitutionality to judge the limits on the structural deficit and volume of public debt taken on by all the public administrations as a whole (art. 135.2 SC); secondly the constitutional mandate which establishes that both the state and the autonomous communities must be authorised by law to issue public debt or contract credit (art. 135.3 SC); and thirdly and most importantly, the decisive constitutional mandate which states that credits to pay interest and capital on the administrations' public debt should always be understood as included in the report of expenditures of their budgets, and their payment shall be an absolute priority (art. 135.3 SC).

As discussed above, European law as a partial parameter of constitutionality in financial matters (Schelkle, 2007: 707 and forward) entails a new development and a challenge for constitutional jurisdiction, which until now had refused to judge EU law. The legal requirement on issuing public debt had been stipulated in the previous art. 135.1 SC for the government of the state before the reform, and now it extends to the ACs as well. Yet in the case of the ACs, the SC does not specify whether the law is supposed to be state-wide or regional. However, we should understand that the law can only be a state law, bearing in mind the state's exclusive competence over the bases and coordination of the general planning of economic activity (art. 149.1.13<sup>a</sup> SC) and its exclusive full competence over the General Treasury and state debt. Regarding this aspect, the legislation on the financing of ACs (Organic Law 8/1980 dated 22 September 1980, abbreviated LOFCA) had already established that the ACs required authorisation from the state to issue debt (for a period of



less than one year) as long as its purpose is not to resolve treasury issues. Finally, the criterion of absolute priority which the constitutional reform gives to credits to ensure that the capital and interest of the debt are paid is of prime importance, since it poses a major limitation on the Parliament's ability to decide on the order of expenditures which the state must deal with each year in the budget law. There is no doubt that in this respect, the incorporation of the *golden rule* into the Constitution is a limitation on the Parliament's political autonomy to decide on essential aspects of the social state, such as expenditures on healthcare, education and social services.

In turn, the preamble of Organic Law 2/2012 dated 27 April 2012 on budgetary stability and financial sustainability, approved by mandate of the constitutional reform of art. 135, repeats the same arguments as reasons for limiting the decision-making capacity of the General Courts on economic and budgetary matters: the economic crisis with a deficit of 11.2% in 2009 in all the public administrations, and the financial tensions in the European markets which revealed the EU's institutional fragility and the need to strengthen the economic integration process and ensure broader fiscal and budgetary integration among all the EU member states. This situation requires a strong economic policy to be applied based on fiscal consolidation, which entails eliminating the structural public deficit and developing structural reforms. In this sense, we should highlight the fact that along with the changes carried out by the previous government (PSOE), the new government (PP) has undertaken an entire series of modifications which reform the laws related to the workplace, the financial system, healthcare and education. And we should also underscore that almost all of them were done via the legal instrument of the decree law (art. 86 of the SC). Throughout 2012, 29 decree laws were approved, that is, a mean of two per month. Exceptionalism, the former hallmark of decree laws, has become commonplace. This circumstance emphasises the fact that all the reforms underway are being carried out practically without the involvement of the Parliament, with the absence of debate on their content and possible alternatives, and that furthermore this is taking place under political circumstances in which the PP has an absolute majority. For this reason, it is not too bold to say that there are major reasons for stating that the institutional response to the crisis has not only lowered decision-making capacity in such a sensitive policy area as the Parliament's exercise of budgetary authority, but even more importantly that it is weakening the solidity of the principle of the division of powers.

### **3. The use and abuse of the decree law as a regulatory instrument**

A) Indeed, in its first year at the helm of the executive power, the PP government has repeatedly used urgent legislation: 29 decree laws to approve a broad set of measures without parliamentary debate, most of them related to the economic and financial crisis which is still besieging citizens and companies.<sup>3</sup> The issues which were the target of regulation, which directly or indirectly affect social rights, include: reorganisation of the financial sector; the reform of the labour market, which was later regulated by the law of the Courts;

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<sup>3</sup> Until the date on which this article was concluded (9 May 2013), six decree laws had been approved by the government so far that year.

financing mechanisms to pay suppliers of local entities; protection of mortgage holders with no resources; the creation of a fund to finance payments to suppliers; the simplification of the obligation of information and documentation of mergers and split-offs of capital companies; the introduction of tax and administrative measures aimed at lowering the public deficit; the modification of financial norms related to European authorities' oversight powers; the rationalisation of public spending on education; environmental measures; the reorganisation and sale of real estate assets in the financial sector; the liberalisation of trade and other services; measures regarding infrastructures and railway services; the extension of the professional retraining programme for people whose unemployment benefits have run out; the reorganisation and resolution of credit entities which would later be approved as a law, etc.

What is more, the recourse to urgent legislation has not been used exclusively by the state government. After the incorporation of this regulatory instrument into the new generation of autonomous community statutes, which started with the Statute of the Community of Valencia in 2006,<sup>4</sup> the governments of different autonomous communities have also resorted to the expeditious route of the decree law to approve new economic and social regulations aimed at dealing with the effects of the economic crisis.

This was the case, for example, of Catalonia (art. 64 SAC), where the decree law has frequently been used by the government of the Generalitat as well. For example, in late 2011, a decree law was passed to take measures on treasury matters, although it was repealed shortly thereafter. In 2012, the decree laws that were approved affected the Generalitat's Economic Financial Rebalance Plan and other needs sparked by the economic and financial situation, most notably the measure adopted on payment of the euro for expediting medical prescriptions, in which the Catalan administration assesses the processing the prescription regardless of the payment method on the use of healthcare services established by the state. Another was on improvements in economic benefits for temporary incapacity of the staff serving the administration of the Generalitat in its public sector and Catalan public universities; another reorganised certain financial guarantees in the public sector and tax modifications; and yet another decree law adopted measures on commercial timetables and certain promotional activities. Even with the acting government assembled after the early elections called on 25 October 2012, a regulation on a new tax on credit entities was approved, which the government of the state immediately appealed on the grounds of unconstitutionality.

In turn, in 2012 the government of the Balearic Islands used the instrument of the decree law (art. 49, Statute of Autonomy of the Balearic Islands [SABI]) to approve urgent measures on sustainable urban planning, reorganise the Health Service, reduce the public deficit and modify the system of commercial activity.

The government of the Community of Valencia followed suit; over the course of the same year it used this regulatory instrument (art. 44 Statute of Autonomy of the Community of Valencia [SACV]) to take measures against the crisis and to promote economic activity, such as by approving urgent measures to lower the deficit of the Community of Valencia; supporting business initiative

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<sup>4</sup> Approved by Organic Law 1/2006, dated 10 April 2006.

and entrepreneurs, micro-companies and SMEs, which was later approved as a law; and regulating administrative certification bodies. It also used decree laws to pass measures to guarantee budgetary stability and foster competitiveness and to restructure and rationalise the public business and foundation sector, which were also later approved as laws. More recently, we should mention the case of Andalusia, in which the government (art. 110 SAA) approved Decree Law 6/2013 dated 9 April 2013 on measures to ensure compliance with the social function of housing.

B) This unbridled dynamic of dealing with the legal measures to counter the crisis makes the Constitutional Court's doctrine on the decree law a mere abstraction. Even though, as a general rule, the court has been fairly flexible in relation to the legal judgement on each case under the assumption of the qualifying competence of article 86.1 SC ("in case of extraordinary and urgent need") (Santolaya Machetti, 1988: 103 and forward), this does not mean that the jurisprudential permissiveness towards the government on the judgement of opportuneness legitimises the indiscriminate avalanche of decree laws on record. This observation is particularly applicable statewide, but that does not exclude its applicability to autonomous community decree laws as well, where we can glean that the same jurisprudential doctrine can be applied to their essence given their legal similarity to the figure of state regulation.

Regarding the crux of the matter being discussed in this study, that is, the effects of regulation on rights in the social sphere, it is not the same if this affect takes place as a consequence of a parliamentary debate on a project or proposed law, which can be amended as part of the different political options expressed in the Parliament, and if it comes from a decision which is, in fact, unilateral by the government. After all, in the parliamentary procedure of the decree law, the position of the Parliament – and specifically the Congress of Deputies – regarding the government is in fact quite forced, and probably more similar in comparative terms to an administrative adhesion contract than a more symmetrical relationship between the parties. In any event, what becomes clear is that the holistic debate prior to the approval or even potential repeal of the decree law does not allow for detailed or particularly plural deliberation on the different aspects contained in the articles of the provision. The government is the one to push the Parliament to accept or reject the entire contents of the decree law *ad limine*. And if, as with the current legislature in the General Courts, the government also has an ample parliamentary majority, the debate is, in fact, more formal than anything else. The opposition parliamentary groups express their position in forcibly more general terms, and the ministry with authorities over the matter is usually limited to reproducing the arguments contained in the Statement of Motives of the decree law.

C) The Constitutional Court's doctrine on the existence of qualifying competence, based on a situation of extraordinary and urgent need, was initially outlined in CCR 29/1982 dated 31 May 1982 (which was later reiterated), which states that the bulk of this determination, with a reasonable margin of discretion, corresponds to the government, which is the entity that exercises the function of direct policymaking. This general criterion has been applied on social and economic matters. However, despite this general criterion which attributes deference to the government, the Court itself clarified that the qualifying assumption is not synonymous with a kind of open clause that gives the government an omni-modal, unrestricted margin of determination. As the

Council of Statutory Guarantees of the Generalitat de Catalunya has noted when referring to constitutional jurisprudence, this interpretation of article 86.1 SC means that “[...] in spite of the government’s determination, because of its factual nature it is a decision that befalls the bodies which have the political direction; the Constitutional Court, as stated in CCR 29/1982 dated 31 May 1982, is not disempowered to control the actions of these political bodies. That is, that the political nature of the decision ‘[...] cannot be an obstacle to extending the examination of the qualifying competence to the knowledge of the CC or whenever needed to ensure the use of the decree-law in line with the Constitution’ (LU 3)”.<sup>5</sup>

The rule of deference regarding the political nature of the government’s decision seems to have undergone a substantial change or even a kind of turning point in CCR 68/2007 dated 28 March 2007, which declares unconstitutional Royal Decree Law 5/2002 dated 24 May 2002 on urgent measures for the reform on the protection of unemployment and the improvement of employability. Specifically, it deemed that the government provided no justification that would allow it to determine the existence of the assumption of qualifying competence, per art. 86.1 SC.<sup>6</sup> In theory, this ruling signalled a change in criterion in the sense that it required the government, via the report that should accompany the development of the draft provision within the government stating the motives and the parliamentary debate approving it, to make a greater argumentative effort to justify its competence to act extraordinarily and urgently with regard to a specific situation. However, this more restrictive canon does not seem to have convinced the Executive to change the broad and instrumental conception of the assumption of qualifying competence of the decree law as it had been applying, regardless of the political stripe of the governments and parliamentary majorities which had supported them. In the slew of decree laws approved in late 2012, we can find several examples that also sparked a consultative opinion on unconstitutionality from the Council of Statutory Guarantees because of the lack of justification of the situation of extraordinary and urgent need. Its arguments are particularly interesting for the purposes of this paper.

This is the case, for example, of Royal Decree Law 16/2012 dated 20 April 2012 on urgent measures to guarantee the sustainability of the National Health System and to improve the quality and safety of its services, whose content directly affects the right to healthcare. Even though the state government deemed that the requirements stipulated by article 86.1 SC were indeed in place, in its Opinion 6/2012 dated 1 June 2012, the Council stated that “[...] from the text of the Decree Law, one can glean that implementation of the main elements of the new healthcare system will take more than four months (first transitory provision) and therefore these are measures that ‘do not instantaneously modify the existing legal status’ (CCR 29/1982, LU 3, and 1/2012, LU 11). In this regard, we could argue in favour of the government’s thesis that the aforementioned

<sup>5</sup> Council of Statutory Guarantees ruling no. 7/2010, LU 3.

<sup>6</sup> However, we should not downplay the fact that when STC 68/2007 was approved, Royal Decree Law 5/2002, passed by the Aznar government (months later it would be enacted as law), whose content was the subject of an appeal over unconstitutionality, had already been repealed by Decree Law 5/2006, approved by the Rodríguez-Zapatero government, which reinstated procedural salaries in dismissal processes which the former had eliminated.

timeframe is necessary in order to implement the system, but this is not justified in the preamble to the royal decree law, which only contains a general reference to the need to use a regulatory instrument with immediate effects because the measures that seek to guarantee the sustainability of the system will be applied as urgently as possible. This omission is even more glaring when we examine the transcription of the approval debate, in which no reference is made to this issue” (LU 2). Therefore, the Council deemed that the requirement of urgency was not justified.

Its opinion on another case was quite similar in that it also denied that the same requirement was justified in such a core matter as the fundamental right to education, which was affected by Royal Decree Law 14/2012 dated 20 April 2012 on urgent measures to rationalise public spending on education (Opinion 7/2012, dated 8 June; LU 3).

What is more, the excess use of decree laws has not only affected the failure to justify the assumption of qualifying competence, but it also concerns non-compliance with one of the material limits prescribed by article 86.1, which states that decree laws “[...] cannot affect [...] the rights, duties and freedoms of citizens regulated in Title I [...]”. This major issue was posed regarding another important reform stemming from the economic crisis, namely the one prescribed by Royal Decree Law 3/2012 dated 10 February 2012 on urgent measures to reform the job market.<sup>7</sup>

In its reference ruling, CCR 111/1983 dated 2 December 1983, constitutional jurisprudence interpreted that “[...] the restrictive clause of article 86.1 SC (‘they cannot affect...’) must be understood in that it neither reduces the decree law to nothing, as it is a regulatory instrument provided for in the Constitution, ‘which it is possible to use to respond to the changing prospects of today’s life’ (underpinning 5, Ruling dated 4 February 1983), nor permits decree laws to be used to regulate the general system of rights, duties and freedoms in Title I [...]” (LU 8).

According to this reference established by jurisprudential doctrine, the Council of Statutory Guarantees interpreted that “[...] the ‘general system’ of a right, duty or freedom is comparable to the establishment of its legal regime, that is, the system of rules regarding the competence, purpose, form or procedure that define the law, in addition to the rules referring to the limits and guarantees in exercising it, all of which are essential elements of law” (Opinion 5/2012 dated 3 April 2012, LU 2). In this sense, the Council believed that the new regulation prescribed by the labour reform (article 12 sections 1 and 2, and article 14 sections 1, 3 and 6) introduced an entire series of modifications that affect the exercise of two social rights: labour rights (article 35.1 SC) and the right to collective bargaining (article 38.1 SC). Thus, this entailed a general regulation impeded by the aforementioned constitutional jurisprudence.

Thus, with regard to labour rights, the changes were general inasmuch as Royal Decree Law 3/2012 stated that the matters on which management may agree to substantial changes in the working conditions include the “amount of the salary”, an aspect which is an essential part of the collective bargaining

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<sup>7</sup> Later, the labour law reform was subjected to regulation by formal law: Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market, which was also the subject of the Council of Statutory Guarantees Opinion no. 10/2012 dated 22 August 2012.

agreement (CCR 225/2001 dated 26 November 2001, LU 7). According to the Council: “[...] given that, furthermore, the business owner is the one who can agree to the modification without regard to the other party in the labour relation, in this case the royal decree law (RDL) also introduces a general regulation which affects the purpose of the right to collective bargaining” (LU 2).

Regarding the right to collective bargaining in RDL 3/2012, the Council also interpreted that it established a general regulation, given that it introduced new elements that brought about substantial changes in its content, such as: the establishment of the general rule of priority in favour of the company’s side of the agreement when collective bargaining agreements do exist (art. 14.3 of RDL 3/2012); the introduction of the provision of administrative intervention through which, in the absence of agreement between the parties, the resolution of the dispute is attributed to the decision of an administrative body called the National Consultative Commission on Collective Bargaining Agreements, even if this only stems the unilateral will of one party, (art. 14, section 1, of RDL 3/2012); and finally, the introduction of the rule on the limitation of the validity and efficacy of collective bargaining agreements once they have been appealed, that is, what is called the “ultra-activity” of these agreements (art 14.6 of RDL 3/2012).

#### **4. The case of the labour reform and its effects on the labour rights and to collective bargaining**

##### *4.1. On the labour rights*

According to its statement of motives, the reform of the labour market initiated by RDL 3/2012 was envisioned as a way to deal with the economic crisis given the “evidence [of the] unsustainability of the Spanish labour model”.<sup>8</sup> It was also presented as an instrument to “guarantee both flexibility [...] in the management of human resources” and “the security of employed workers”.<sup>9</sup>

One of the most controversial content precepts has been section 3 of article 4 of RDL 3/2012 on indefinite work contracts to support entrepreneurs, which was included within chapter II on “fostering indefinite hiring and other measures to favour job creation”. The content was as follows:

“The legal system of the contract and the rights and obligations derived therefrom shall generally be governed by the provisions contained in the recast text of the Law on the Statute of Workers approved by Royal Legislative Decree 1/1995 dated 24

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<sup>8</sup> “The economic crisis has revealed the unsustainability of the Spanish labour model. The problems of the job market, far from being short-term, are structural, affect the very underpinnings of our social-labour model, and require an in-depth reform, which continue to be called for by all the world and European economic institutions despite the regulatory changes undertaken in recent years [...]”.

<sup>9</sup> “The proposed reform attempts to guarantee both the flexibility of business owners in managing their human resources and the security of the employed workers and adequate levels of social protection. This is a reform in which everyone wins, both companies and workers, and it strives to satisfy the legitimate interests of everyone more and better.”

March 1995, and the collective bargaining agreements for indefinite contracts, with the sole exception of the length of the trial period referred to in article 14 of the Statute of Workers, which shall be one year in all cases.”

The Council of Statutory Guarantees issued the aforementioned interpretative Opinion 5/2012 (LU 5) deeming that this precept did not run counter to articles 35 and 14 of the Constitution, if it was interpreted in accordance with the terms expressed in legal underpinning 6.1 of the Constitution. Nonetheless, we should draw attention to the arguments cited in this regard, especially the warnings about the risks of unconstitutionality which could arise from the content of the precept.

The reservations regarding the unconstitutionality of this precept formulated by the parliamentary groups which asked for the Council’s opinion were the following: 1) the extension of the trial period of contracts called for in article 14 of the Statute of Workers (SW) to one year may violate labour rights (art. 35 SC), “in that after one year it allows the contract not to be renewed without the need for indemnification, or equally, it allows workers to be dismissed gratuitously and without justified cause”; and 2) this new regulation, the Council claimed, may violate article 4 of ILO Convention 158 from 1982 on severing labour relationships, which requires a justified cause to sever the labour relationship. In short, the Council’s arguments were the following:

- The constitutionally protected content on labour rights (art. 53 SC) is job stability (CCR 223/1992, LU 3), which prevents unfounded temporary contracts and particularly rejects the termination of contracts without just cause (CCR 125/1994, LU 3).
- Article 35 SC guarantees workers *legal status* when the business owner seeks to terminate their job contract. This means that this termination must fulfil certain guarantees: the cause must be legally provided for by law; the decision to terminate the contract must be expressed in a pre-notice; if needed, the corresponding workers’ representatives must be consulted; and finally, it must be formalised in a written notification (art. 53.1 SW). If these requirements are not met, the business’s unilateral decision may have detrimental effects on labour rights.
- The provisions of article 53.1 SW are in line with international law as part of the state’s internal legal system on labour matters (art. 96.1 SC). Specifically, this refers to ILO Convention 158, whose content must be borne in mind regarding the provisions contained in article 10.2 SC, so that the “in accordance” interpretation established by the constitutional precept consists, according to the constitutional jurisprudence in this area, in the fact that the rights that are applicable to the specific case “should not be interpreted in contradiction” with the norms of international law on human rights (CCR 113/1995, LU 7) (Saíz Arnáiz, 2008: 10).
- According to the provisions of art. 3 in article 4 of RDL 3/2012, the trial period in indefinite job contracts to support entrepreneurs is

characterised by permitting the unilateral termination of the contract during that period without any cause being cited and with no indemnification for the worker, nor is any given formalisation required to terminate the contract. Therefore, the reasons why the contract can be terminated during the trial period are not susceptible to judicial control except in the cases which entail a discriminatory act banned by article 17 SW.

- The trial period according to ordinary jurisprudence on social matters consists in “[...] on-the-ground experimentation of the labour relationship through the execution of the respective roles of the parties, and its manifest function is to check the professional aptitude and adaptation to the job [...], with these functions being more significant in qualified and managerial jobs than in other less qualified jobs. It consubstantially has a temporary, provisional nature, hence it is reasonable for its duration to generally be brief” (SCR dated 20 July 2011, Chamber for Social Matters, LU 2).
- The length of the trial period established by RDL 3/2012 is “one year in all cases”, with no provisions for shorter lengths. We should add that the statement of motives cites no motivation behind such a length which reflects a legitimate purpose. Likewise, the one-year trial period is applied indistinctly to any kind of job, regardless of whether or not it is qualified, which could lead to discriminatory treatment since the regulation does not distinguish between different situations. The consequence of this regulation could be a denaturation of the trial period.<sup>10</sup>
- Despite this, the Council ultimately determined that the interpretation of this regulatory provision on the length of the trial period could not be limited to its strictly literal reading but instead it had to be placed in systematic relationship with the entire content of article 4 of RDL 3/2012. In this sense, the kind of labour contract introduces an entire series of measures on fiscal incentives (section 4)

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<sup>10</sup> Regarding the length of the trial period, we should underscore the jurisprudence of the European Social Rights Committee of the Council of Europe, whose decision dated 23 May 2012 on the grievance filed against Greece by two unions from this country, the General Federation of Employees of Public Electrical Companies (GENOP-DEI) and the Confederation of Unions of Public Employees (ADEDY), interpreted that the one-year trial period runs counter to the European Social Charter of 1961. It specifically refers to Greek Law 3899 dated 17 December 2010, whose article 17.5 stipulates that during the trial period, an indefinite contract can be terminated without forewarning or indemnification for dismissal. The unions claimed that this precept violated article 4.4 of the Human Rights Charter of 1961. The Council’s decision on this matter was the following: “25. i) *le droit à un délai de préavis raisonnable en cas de cessation d’emploi s’applique à toutes les catégories de salariées indépendamment de leur qualité, y compris à ceux qui se trouvent dans une relation de travail atypique. Il vaut également en période d’essai. La législation nationale doit être d’une portée telle qu’aucun travailleur ne soit laissé sans protection*” [...] [...] “27. [...] *l’article 17.5 de la Loi 3899 du 17 décembre 2010 ne prévoit pas de délais de préavis ni d’indemnité de licenciement dans les cas d’interruption d’un contrat de travail qualifié par elle de ‘à durée indéterminée’ pendant une période probatoire qu’elle étend à un an.*” “28. *Par conséquent, quelle que soit la qualification qu’est susceptible de recevoir le contrat dont il s’agit, le Comité dit que l’article 17.5 de la Loi 3899 du 17 décembre 2010 constitue une violation de l’article 4.4 de la Charte de 1961.*”



and bonuses (section 5) targeted at business owners and workers, which can be considered to be aimed at avoiding this denaturation of the trial period because of the employer's abusive or fraudulent use of the purpose of the regulation. Analysing it as a whole, and beyond the absence of guarantees detected, article 4 establishes a regulation that objectively tends to provide greater job stability.

However, we should add that the Council's clear mistrust of the regulation on indefinite labour contracts and support of entrepreneurs did not go unnoticed by the state lawmakers. Indeed, after the content of RDL 3/2012 was enacted as a law, specifically section 3 in fine of article 4 of Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market, they added a new clause clearly aimed at trying to prevent this kind of contracting from becoming, *de facto*, an instrument that companies can easily abuse by offering unlimited, repeated temporary contracts. The terms of the regulatory addition were the following: "A trial period cannot be established when the worker has previously performed the same functions in the company under any kind of contract".

#### *4.2. On the right to collective bargaining*

Another precept of RDL 3/2012 which sparked particular controversy was section 1 of article 14, which rewrites section 3 of article 82 SW on the procedure regulating collective bargaining agreements. The last paragraph stipulates the following:

"When the consultation period ends without an agreement and the parties have not subjected themselves to the aforementioned procedures [referring to the prior phases when there is agreement among the parties or mediation via the autonomous conflict-resolution systems] or they have not resolved the dispute, either of the parties may ask that the National Consultative Committee on Collective Bargaining Agreements resolve the dispute [...]".

One of the features of unconstitutionality alleged by the plaintiffs is grounded upon the violation of the right to collective bargaining (art. 37.1 SC) because of the establishment of forcible arbitration, as well of the right of judicial protection (art. 24.1 SC) citing the same reason, the latter an aspect which we shall not discuss in light of the content of this article. The Council of Statutory Guarantees also weighed in on this issue in the above-cited Opinion 5/2012 (LU 5). In summary, the crux of its opinion was the following:

- The kind of intervention of an almost arbitral nature that the precept in question attributes to the aforementioned National Consultative Committee on Collective Bargaining Agreements (NCCCBA) is not unheard of in labour law: the labour conflict-solving procedures of the autonomous communities offer a constitutional dimension connected with the rights to collective bargaining (art. 37.1 SC), the right to join unions (art. 28.1 SC), the right to adopt collective conflict measures

(art. 37.2 SC) and the right to judicial protection (art. 24.1 SC). This constitutional dimension stems from the capacity of the arbitration decision to outweigh the judicial ruling. In this sense, constitutional jurisprudence has not hesitated to accept the full conformity of the arbitration with constitutional principles (CCR 175/1996, LU 4).

- However, lawmakers establishing *ex lege* an obligatory administration intervention to solve conflicts over certain matters is an entirely different matter. The Constitutional Court has rejected the constitutionality of obligatory public arbitration as a procedure to resolve conflicts on changing working conditions (CCR 11/1981, LU 24).
- The controversial issue regarding section 1 of article 14 lies in the fact that the decision to turn to the arbitration of the NCCCBA can come from “either of the parties”, which means introducing a rule of unilaterality to solicit the intervention of that Committee. The new regulation entails a profound change in the legal system of collective bargaining, since it means establishing a rule which is not generally applicable from the collective bargaining agreement agreed to earlier. This non-application is reached via the sole desire expressed by one of the parties: in consequence, it breaks with the constitutional mandate that guarantees the binding force of collective bargaining agreements which obligate lawmakers (art. 37.1 SC). As labour doctrine has stressed (CRUZ VILLALÓN, 2012: 394), the new rule ignores the collective *pacta sunt servanda* which is based upon the free consent of the parties, which the recipients cannot alter unless they agree otherwise.
- The new regulation does not guarantee the right to collective bargaining (art. 37.1 SC) because it violates the freedom of negotiation by establishing the rule of unilaterality in the regulatory phase leading to the NCCCBA’s intervention, violating the binding force of collective bargaining agreements. In this sense, we should bear in mind what constitutional jurisprudence has to say on this matter:

“[...] the collective bargaining agreement’s subjection to the regulatory power of the state, which is constitutionally legitimate, neither implies nor permits the existence of administrative decisions that authorise the waiver or unique inapplicability of provisions contained in collective bargaining agreements, which would entail ignoring the binding efficacy not only of the collective bargaining agreement but also of the principles guaranteed in art. 9.3 SC.

“Consequently, an interpretation of art. 41.1 SW, which would allow the labour administration to authorise the business owner to make substantial changes in the working conditions provided for and regulated in a collective bargaining agreement in force, would run counter to art. 37.1 SC [...]” (CCR 92/1992, LU 4)

- In short, inasmuch as just one party can impose on the other a resolution from the administration (NCCCBA) which rules on the appropriateness of modifying the working conditions, this is admitting that the collective bargaining agreement can be modified administratively, which is why it violates the right to collective bargaining (art. 371. SC).

Subsequently, Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market, in the part relevant for an analysis of the constitutionality of section 1 of article 14, which led to a recasting of section 3 of article 82 SW on the regulatory procedure of collective bargaining agreements, introduced no changes that would avoid the unconstitutionality expressed above by the Council of Statutory Guarantees in Ruling 5/2012 (LU 5).

## 5. The right to housing and the measures to guarantee it

The high levels private debt of families and companies generated by the economic crisis in Spain has particularly affected the availability of housing purchased through mortgages<sup>11</sup> granted by the different banks. Many citizens' inability to meet their mortgage payments as a result of the devastating effects of the crisis on employment has led to foreclosures and evictions from numerous flats due to lack of payment. The loss of housing has become a large-scale social problem.

Given a situation of social fragmentation which is sounding ever more alarms, some authorities have begun to take measures to dampen the destructive effects on the right to decent, adequate housing (art. 47 SC). Among these measures, the one that has sparked the most legal controversy prescribes the forcible rental of empty homes at the request of the public administration. The Regional Government of Andalusia has recently prescribed this through Decree Law 6/2013 dated 9 April 2013 on measures to ensure fulfilment of the social function of housing.<sup>12</sup> We should also refer to another earlier provision which sparked notable social and legal controversy in its day, but back before the effects of the crisis were as striking in people's everyday lives, namely Law 8/2007 of the Parliament of Catalonia, dated 28 December 2007, on the right to housing.<sup>13</sup> Its previous wording, until the approval of the House Plenary

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<sup>11</sup> The conditions under which these mortgages were signed were often abusive, a circumstance which has been noticed by the Luxembourg court in its important ruling on 13 March 2013, issued on the occasion of a preliminary ruling by Mercantile Court no. 3 of Barcelona with regard to certain precepts in Directive 93/13/EEC of the Council, dated 5 April 1993, on unfair clauses in contracts made with consumers. In its provisions, the CJEU ruling interpreted that: "Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that it is opposed to a regulation of a member states, such as the controversial regulation in the main lawsuit, that at the same time, within the framework of the procedure of mortgage foreclosure, does not provide the possibility of formulating motives of opposition based on the unfair nature of a contractual clause which constitutes the foundation of the enforceable title, does not allow the judge to ascertain the declarative process to become competent to determine the unfair nature of this clause, to adopt protective measures, including, in particular, the suspension of the procedure of mortgage foreclosure, when agreeing to such measures is necessary to guarantee the full efficacy of its final decision."

<sup>12</sup> Official Gazette of the Regional Government of Andalusia (BOJA) no. 69, dated 11 April 2013.

<sup>13</sup> Official Gazette of the Government of Catalonia (DOGC) no. 5044, dated 9 January 2008.

Session, had called for measures similar to the ones that the Andalusian government has now taken urgently.<sup>14</sup> The issue of constitutional relevancy sparked by the case is the determination of whether this administrative measure may violate the right to housing (art. 33 SC).

In its statement of motives, Decree Law 6/2013 issued by the Regional Government of Andalusia dated 9 April 2013 introduces a definition of the social function of the right to housing which, in fact, is the same as the one used by constitutional jurisprudence, but to define the right of property:<sup>15</sup> “The social function of housing shapes the essential content of law through the possibility of imposing positive duties on owners which ensure its effective use for residential purposes, with the understanding that this essential content cannot be established based on the exclusively subjective consideration of law or individual interests. The social function of housing, in short, is not an external limit to its definition or exercise but an integral part of the law itself.” It then adds that: “therefore, individual utility and social function are inseparable parts of the content of the right of property”. After describing the housing situation in Andalusia,<sup>16</sup> the decree law concludes that there is “[...] an outrageously large housing stock that is unused or underused, while at the same time an unmet demand, with not enough housing on the market and inadequate prices, rendering it necessary to promote their use [...]”.

With this purpose in mind, the content of the decree law stipulates an entire compendium of action initiatives on unoccupied housing which consist of promotional measures. Likewise, on a different front, this time through coercive and sanctioning measures, it also suggests fostering access to housing through rentals, the latter primary targeted at people who cannot maintain their home

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<sup>14</sup> In its first five sections, article 42 of the Draft Law on the Right to Housing (“Actions to avoid the permanent vacancy of housing”) calls for an entire series of promotional measures aimed at avoiding the proliferation of empty homes. Once these measures were exhausted, section 6 stipulates that in areas where there is a proven strong demand for residency, the administration with authority on the matter may agree to the forcible rental of the home, having previously declared the owner’s failure to fulfil the social function. In line with this, if two years have elapsed since notification of the declaration of the home and it still remains empty, the administration may expropriate the use of the home under the terms stipulated by article 3.d of this draft law in order to rent it to third parties for a period that cannot exceed five years, after which the owner may resume use of their home. The draft law then states that the procedure to carry out this action must abide by the urban planning and forced expropriation laws, and in terms of fair price it must value the corresponding indemnification of the right to temporary use and defray the expenses taken on by the administration to manage and execute improvements in the home, if needed. The Generalitat’s Consultative Council handed down a majority opinion (4 to 3 members) that section 6 of article 42 of the draft law ran counter to the Constitution because it generated legal insecurity in that “it is unlikely or very difficult to determine, rendering it difficult to apply...”, “the lack of determination of what is meant by ‘areas where there is a proven strong demand for residency’”, and “[...] it leads to discrimination among the owners of unoccupied homes in the same area qualified as having a ‘proven strong demand for residency’.”

<sup>15</sup> Constitutional Court Rulings 111/1983 and 37/1987.

<sup>16</sup> According to the figures provided in the Statement of Motives, the 2001 population and housing census that year showed there were 548,669 empty homes in Andalusia, which meant 15.5% of the total housing stock and 22.7% of housing described as main residences. According to the latest figures published by the Ministry of Public Works, the housing stock in Andalusia is estimated at 4.5 million, which entails an increase of one million over the stock in 2001. Therefore, in ten years the housing stock has increased almost 25%.

because of a sudden increase in their debt. In this case, we should pay particular attention to the second additional provision on the “Declaration of social interest for the purposes of forced expropriation of the coverage of housing needs of people in special circumstances of social emergency”.

The subjective and objective elements of this provision are the following:

“1. The coverage of the housing needs of people in special circumstances of social emergency involved in eviction proceedings for foreclosure is declared to be of social interest for the purposes of forced expropriation of the use of the home being foreclosed for a maximum period of three years starting from the starting date agreed upon by the jurisdictional body with authority in this matter.

“2. This decree law shall be applicable to homes involved in eviction proceedings initiated by banks, or their real estate subsidiaries or asset management entities, all without prejudice to the provisions contained in the basic state regulations.”

Similar to the legal question posed by the Draft Law on the Right to Housing in Catalonia, in this case, too, there is the possible influence of the coercive measure of temporary forced expropriation over the property right of the owners of empty homes, which deserves our attention.

Article 33 SC states that: “2. The social function of these rights shall delimit their content, in accordance with the laws”. It then adds that: “3. No one may be deprived of their assets or rights except for a justified cause of public utility or social interest through the corresponding indemnification and in accordance with the provisions of the laws”.

In short, the jurisprudence on property law and the social function of housing is the following:<sup>17</sup>

a) The SC’s conception of private property law reveals that the Constitution did not choose an abstract conception of this law. This cannot be conceived solely as a subjective sphere with free interpretation of the assets that are the object of the domain reserved by its owner, subjected solely to the general limitations that the law imposes to safeguard the legitimate rights and interests of third parties or the general interest. Instead, property law must also be recognised as a set of duties and obligations established in accordance with the law in line with the values and interests of the collective, and therefore in harmony with the purpose or social utility that each category of assets mentioned should serve.

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<sup>17</sup> CCR rulings 11/1983 dated 2 December 1983 and 166/1986 dated 19 December 1986, which respectively resolved the appeal and issue of unconstitutionality referred to in the expropriation of the Rumasa Holding. Likewise, CCF 37/1987 dated 26 March 1987 on a rural property matter (Andalusian Law 8.1984 dated 3 July 1984, on agrarian reform) which established a much more elaborate doctrine on the right to property and its social function. In the same vein are CCRs 164/2001 dated 11 July 2001, 178/2004 dated 21 October 2004, and 112/2006 dated 5 April 2006.

b) The SC does not limit property law to the merely civil conception, reduced to the margins of article 348 of the Civil Code which defines it as “the right to enjoy and have something without any other limitation than those established by law”. What can be gleaned from the supreme law is a conception of rights which are not solely susceptible to being limited; instead, their very limits are considered essential elements of their objective content. Therefore, the social function has not been understood by the framers of the Constitution as a simple external limit to the delimitation of the right to property but is also an integral part of it: individual utility and social function jointly define the essential content of the right to property in each category of assets.

c) There is no infraction of the essential content when a legal regulation of the right to property restricts the owner’s ability to take decisions on the use, purpose or profit taken from the assets at stake, or when certain duties are imposed to strive for a more productive use of these assets, as long as their profitability can be guaranteed.

d) The Constitutional Court has often used the hermeneutic criterion of the principle of proportionality (suitability, necessity and proportionality), especially in regard to the fundamental rights of freedom and participation of Section 1 of chapter II of title I of the SC.<sup>18</sup> However, this hermeneutic criterion has evolved by incorporating a higher degree of objectivity in the evaluation of the proportionality of the measures taken by public powers, limiting them to the exercise of rights.<sup>19</sup> In this interpretative line, the evolution of the criterion of proportionality has primarily affected the formalisation of its material dimension, and it has sketched the requirements needed so that the content of the action taken by a public power can be considered proportionate. The material expression of the judgement of proportionality has been defined via the need to verify the purpose of a measure by integrating the factual and temporal elements, or the simple ban on measures by public powers that do not meet these criteria.<sup>20</sup>

The second additional provision of the Regional Government of Andalusia’s Decree Law 6/2013 dated 9 April 2013 is on depriving people who exercise the right to housing of their ownership. The regulatory measure taken is not a temporary limitation on the right to use the property applied in unique cases involving people who are in circumstances of social emergency as a result of an eviction process and after justifying an entire extremely detailed set of requirements that the potential beneficiary must meet (sections 3 to 15). The proportionality of the measure seems proven given that in a case of eviction, it may be impossible to find an alternative measure that could guarantee the availability of a home in any other way; its need is justified by the absence of a

<sup>18</sup> Among others, Constitutional Court rulings 11/1981 dated 8 April 1981, 53/1985 dated 11 April 1985, 209/1989 dated 15 December 1989, and 214/1994 dated 14 July 1994.

<sup>19</sup> Among others, Constitutional Court rulings 66/1995 dated 8 June 1995, 107/1996 dated 12 June 1996, and 147/2001 dated 27 June 2001.

<sup>20</sup> This jurisprudence is in harmony with what was established by the ECHR in its leading property law case (ECHR ruling dated 23 September 1982; *Sporrong and Lönnroth vs. Sweden*); the Italian Constitutional Court in ruling no. 14 dated 7 March 1964; the Supreme Court of the United States 106 S. Ct. 1058, 1026 (1986) in the *Connolly v. Pension Benefit Corp* ruling; and the ruling by Court 1 of the Constitutional Court of the Federal Republic of Germany dated 1 March 1979.

physical space to live in; and its proportionality in the strict sense is endorsed because furthermore, what is temporally limited is the possession, not the ownership, in the context of a regional situation in which the stock of publicly subsidised homes is rising.

## **6. Calculating vesting periods in part-time work contracts: The case of CCR 61/2013 dated 14 March 2013. The right not to be discriminated against in the exercise of labour rights**

In the new scene of labour relations that has developed over the past decade, part-time work contracts have become a usual feature in the job market landscape. This contractual formula has only become more prominent since the onset of the economic and financial crisis. The latest example is contained in article 5 (part-time contracts) of Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market.<sup>21</sup> It once again calls for the possibility that workers associated with a company via a part-time contract can work overtime and that these overtime hours can be calculated as part of the Social Security contribution base and the bases regulating job benefits.

However, with regard to part-time hiring and the system of calculating the vesting periods in part-time contracts when there is a request to receive a contributory pension, we should pay attention to the position adopted by the Constitutional Court, whose CCR 61/2013 dated 14 March 2013 declared unconstitutional the method of calculation established by the General Law on Social Security, recast text approved by Royal Legislative Decree 1/1994 dated 20 June 1994 in the wording that appears in Royal Decree Law 15/1998 dated 27 November 1998.

From the standpoint of the guarantee of fundamental social rights, this decision is important because it discourages the use of part-time hiring, for which there are already enough incentives during this long crisis, to avoid situations that are discriminatory towards the worker.

The ruling originated in the issue of unconstitutionality posed by the Social Court of the Higher Court of Justice of Galicia on the initial section of the second letter of section 1 of the seventh additional provision of the General Law on Social Security (GLSS), the recast text approved by Royal Legislative Decree 1/1994 dated 20 June 1994, because it may violate article 14 SC.

We should recall that this method of calculation was already questioned by the Court of Justice of the European Union (CJEU), when it handed down a ruling in which it deemed that the way Spanish law treated part-time workers was discriminatory.<sup>22</sup> The CC has accepted the criterion established by the Luxembourg court in its underpinnings.

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<sup>21</sup> This precept modifies letter c) of section 4 of article 12 of the recast text of the Law on the Statute of Workers approved by Royal Legislative Decree 1/1995 dated 24 March 1995.

<sup>22</sup> Section 38 of the CJEU ruling dated 22 November 2012 concluded that: “article 4 of Directive 79/7 should be interpreted in the sense that in circumstances like the those in the main case, it opposes a member state regulation that requires part-time workers, the vast majority of them women compared to full-time workers, a proportionally higher contribution period to access, if desired, a contributory retirement pension in a proportionally lower amount than the partiality of their workday.”

Broadly speaking, the background was the following: a woman had proven 18 years of vesting, 11 of which were part-time, but that was not enough to meet the requirements. In order to determine the vested period needed to earn the right to benefits like retirement, permanent disability, death and survival, temporary disability, maternity and paternity, the norm stipulated that only payments made according to hours worked – either ordinary or extra – would be calculated, and their equivalency would be calculated in “theoretical days paid in”. With this purpose, the law states that the number of hours actually worked should be divided by five, which is equivalent to the daily calculation of 1,826 hours per year. What is more, to have the right to a pension for retirement and permanent disability, a multiplying coefficient of 1.5 should be applied to the number of theoretical days paid into the system. What results from this operation is the number of days which are regarded as accredited to determine the minimal vesting periods, although it is impossible to calculate more days paid in than what would result if the services had been provided full-time (7th additional provision to the GLSS). We should note that between 1994 and 1998, the wording of this precept was different, and that in CCR 253/2004 it nullifies the former regulation by interpreting that the way part-time and full-time workers were treated was unequal.<sup>23</sup>

Even though based on this ruling the wording changed and corrections were introduced into the calculation rules, this did not prevent the issue of constitutionality from arising, which gave rise to CCR 61/2013. In summary, the arguments were the following:

a) The GLSS continues to treat full-time and part-time workers differently in its calculation of vesting periods, which is not justified by the contributory requirements of the pension system. Likewise, this decision cannot be viewed as a sphere subjected to the free determination of lawmakers either, as sustained by the State Counsel’s Office. First of all, in relation to the doubt as to the issue of unconstitutionality via the possible existence of indirect discrimination on the basis of sex, the Court stated that the relative assessment of whether the precept questioned was justified and proportionate is a determining criterion in the solution to be adopted.

Accordingly, recall that as a formally neutral or non-discriminatory treatment with regard to which, in reality, different factual conditions between workers of both sexes can be detected (CCR 240/1999, LU 6 and CCR 3/2007 LU 3), indirect discrimination is applicable to the case of part-time workers. Regarding the particular case that raised the question, the ruling recognises that the provision is formally neutral but that, in an exercise of empirical

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<sup>23</sup> “[...] what does not appear justified is that a differential treatment is established between full-time and part-time workers in terms of fulfilment of the required vesting period to access contributory social security benefits, a distinction which is therefore arbitrary and furthermore leads to a disproportionate result, since it hinders access to the protection of social security by workers hired part-time, a situation which predominantly affects working women, as revealed by the statistical figures. Therefore, from this perspective as well we must conclude that the second paragraph of art. 12.4 Law on the Statute of Workers, in the wording that appears in Royal Legislative Decree 1/1995 dated 24 March 1995, violates art. 14 SC as it leads to indirect discrimination because of sex.” (CCR 253/2004, LU 8)



jurisprudence, it states that based on the statistical data we can conclude that part-time contracts are an institution that primarily affects women.<sup>24</sup>

b) Based on this, the Court rejects the fact that the criterion of proportionality should serve as the sole criterion for determining the retirement pension received according to the number of hours worked:

“[...] when part-time work is not a more or less exceptional episode in the employee’s working life and when the usual workday is not very long, the application of the criterion of proportionality shall continue to be a disproportionate obstacle for their access to the retirement pension, despite the corrective rule”.  
(CCR 61/2013 LU 6)

c) Likewise, the application of the corrective coefficient for the criterion of proportionality established in the reform of the GLSS after 1998 does not prevent cases like the one affecting the woman in the lawsuit from happening, because:

“[...] just as we already stated in CCR 253/2004 dated 22 December, ‘this hinders the very access to the benefit by requiring a higher number of days worked to accredit the vesting period stipulated in each case, which is particularly burdensome or excessive in the case of workers with extensive periods of part-time contracts in their working lives and in relation to the benefits that require long contribution periods’ (CCR 61/2013 LU 6)

## 7. In conclusion

The economic crisis has had particularly severe effects in the states within the Eurozone, and it has had detrimental effects on the integrity of individuals’ social rights. Among other measures taken, the constitutional response to deal with it, which consists of incorporating the principle of budgetary stability into the supreme law, nonetheless has a rather relative juridical value because this principle was already contained in the European treaties. What is more, its pre-eminence over the national legal systems made it possible to avoid a constitutional reform which, particularly in Spain, has reflected more circumstances of political opportunity towards European authorities than criteria of a legal order. In any event, in the incorporation of what is called the golden rule on budgetary stability contains the seed of a labour law which restricts social rights and has at times violated the Constitution.

Indeed, the reform of the labour law approved in Spain to combat the effects of the crisis, grounded upon a single economic policy option based exclusively on lowering deficits and public debt, has translated it to the regulation of labour contracts and, more broadly, to the system of labour

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<sup>24</sup> It cites figures from 2002 from the National Statistical Institute which counted 198,100 salaried part-time men and 879,200 women in the same labour situation.

relations, a concept based on the bilateral relationship between business owners and workers. This relationship is grounded upon the supposedly autonomous will of the parties as individual subjects, apart from the dimension of collective interests which is also involved. In this way, the right to collective bargaining articulated via collective bargaining agreements has been subjected to a specific regulation which actually revives the appearance of public arbitration obstructed by constitutional jurisprudence at the request – in fact – of business owners as the preeminent parties in labour relationships, such that it neutralises the labour functionality of the right contained in article 37.1 SC.

A similar effect has taken place regarding labour rights in what the constitutional jurisprudence has interpreted as a defining feature of their content, namely the ban on unjustified dismissal, even though the latest legislation from the General Courts in this regard has managed to mitigate some of the more corrosive effects that the government's urgent legislation had approved.

Another consequence of the crisis affects the legal form of the measures taken to deal with it. In this respect, the regulatory instrument of the decree law has particularly come to the fore and has been used abusively by both the government of the state and the governments of different autonomous communities, breaking with the exceptional nature that theoretically characterises this source of law. The effect has been particularly detrimental to guaranteeing the division of powers as one of the essential principles of the rule of law, such that it is not too bold to state that parliamentary debate in the Congress of Deputies and – no doubt – in the parliaments of the autonomous communities on measures to counter the crisis have been glaringly missing.

Finally, the economic crisis has also revealed the existence of measures aimed at preserving one of individuals' most prized assets, housing, which is threatened by foreclosures caused by unpaid mortgages as a result of the unbridled growth in private debt. In this sense, the provisions approved in the autonomous communities aimed at promoting and at times forcing owners to rent homes for social use do not entail a limitation of the right to property that was impeded by the Constitution but an expression of their social function.

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